

BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF DELAWARE  
VOLUME 9

IN RE: IN THE MATTER OF :  
INTEGRATED RESOURCE PLANNING :  
FOR THE PROVISION OF STANDARD :  
OFFER SUPPLY SERVICE BY : PSC DOCKET NO.  
DELMARVA POWER & LIGHT : 06-241  
COMPANY UNDER 26 DEL. C. §§ :  
1107(c) & (d): REVIEW AND :  
APPROVAL OF THE REQUEST FOR :  
PROPOSALS FOR THE CONSTRUCTION: :  
OF NEW GENERATION RESOURCES :  
UNDER 26 DEL. C. §§ 1007(d) :  
(OPENED JULY 25, 2006) :

Public Service Commission Hearing taken  
pursuant to notice before Gloria M. D'Amore, Registered  
Professional Reporter, in the offices of the Public  
Service Commission, 861 Silver Lake Boulevard, Cannon  
Building, Suite 100, Dover, Delaware, on Tuesday,  
February 6, 2007 beginning at approximately 1:45 p.m.,  
there being present:

APPEARANCES:

On behalf of the Public Service Commission:  
ARNETTA McRAE, CHAIR  
J. DALLAS WINSLOW, COMMISSIONER  
JAY LESTER, COMMISSIONER  
JOANN CONAWAY, COMMISSIONER  
JEFFREY CLARK, COMMISSIONER

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## 1 APPEARANCES CONTINUED:

2 On behalf of the Public Service Commission Staff:  
3 GARY A. MYERS, ESQUIRE

4 On behalf of the Public Service Commission Staff:  
5 JAMES McC. GEDDES, ESQUIRE

6 On behalf of the Public Service Commission Staff:  
7 MIKE SHEEHY, DEPUTY DIRECTOR  
8 KAREN J. NICKERSON, SECRETARY  
9 ROBERT HOWATT

10 On behalf of the Office of the Public Advocate:  
11 JOHN CITROLO

12 On behalf of the Department of Natural Resources  
13 & Environmental Control:  
14 PHIL CHERRY

15 On behalf of the Office of the Controller General:  
16 JENNIFER COHEN

17 On behalf of Bluewater Wind:  
18 THOMAS P. MCGONIGLE, ESQUIRE  
19 PETER MANDELSTAM

20 JEREMY FIRESTONE, Ph.D., J.D.

21 On behalf of Conectiv Energy:  
22 I. DAVID ROSENSTEIN, ESQUIRE

23 On behalf of NRG Energy:  
24 MICHAEL HOUGHTON, ESQUIRE

1 CHAIR McRAE: The last item on the  
2 agenda remains the RFP, IRP, the motion.

3 MR. SHEEHY: Madam Chair. May I make a  
4 request for a 15-minute recess at which point we will go  
5 ahead and proceed with whoever is here.

6 CHAIR McRAE: Very fine. I guess that  
7 will be the fair resolution of this. We will have a  
8 15-minute break and hope that we can get the  
9 representative from Management and Budget here by then.

10 (Off the record at, approximately, 1:31  
11 p.m.)

12 (Back on the record at, approximately,  
13 1:45 p.m.)

14 CHAIR McRAE: I have been informed that  
15 people in the back of the room feel the Commissioners  
16 are mumbling. And it is not that we are shy. So, I  
17 would ask those of you in the back of the room, if our  
18 voices should fall, if you would raise your hand and let  
19 us know, and we will be more conscious of it. We will  
20 try to speak in the mic, though.

21 I have been informed that Mr. Scoletti  
22 of Management and Budget is not going to be able to join  
23 is. So, we are just going to proceed without that  
24 representation.

1                   What we have before us -- well, let me  
2     start out, first we have an order, then we will go to the  
3     motion because I don't think the order is affected by any  
4     of that. I know it is Order 7131. I have to find it in  
5     my pile. Somebody give me theirs. It's in my pile  
6     somewhere.

7                   Mr. Geddes.

8                   MR. GEDDES: Madam Chair, Members of the  
9     Commission.

10                  This is an order that would create a  
11     procedural framework to continue the Commission and the  
12     other state agencies oversight of the RFP process and the  
13     evaluation that is required by House Bill 6.

14                  What it provides for is a schedule that  
15     allows for additional public comment after your  
16     evaluation meeting on the 27th. It provides for town  
17     meetings in each county during the first week of March.

18                  It also directs Staff to work with the  
19     consultant to provide an interim report on the IRP that  
20     Delmarva has filed in which the Commission has opened a  
21     separate docket to consider, and that report would be  
22     received by the 4th of April, the idea being that would  
23     hopefully give the agencies, the State agencies a  
24     context, or framework, if you will, to consider the

1 evaluations that were performed on the 27th. And then,  
2 if appropriate, to request the parties or Delmarva  
3 specifically to enter into whatever contract with  
4 whatever state agencies feel are appropriate. And so,  
5 this order accomplishes that.

6 The hearing examiner in the IRP docket,  
7 Mr. O'Brien, had a teleconference which considered the  
8 IRP, but also, there were discussions about the RFP and  
9 the linkage between the two dockets. I believe most of  
10 the State agencies were represented in that  
11 teleconference. And I don't believe any of the parties  
12 that were on the call or the state agencies had any  
13 particular problem with this proposed procedural  
14 schedule. Those that are here can speak for themselves.  
15 This is something that staff, and, I believe, the other  
16 parties believe is an appropriate way to move forward in  
17 this docket.

18 I would be happy to answer any  
19 questions.

20 CHAIR McRAE: Commissioners, do you have  
21 any questions on the order? And not just Commissioners,  
22 I apologize, also to the other agencies involved here.  
23 Are there any questions or comments? You did receive a  
24 copy of the order, or did you not?

1 MR. CHERRY: And we did participate, I  
2 did, participate in the call with the hearing examiner.  
3 And this does reflect the schedule that we thought was  
4 the best approach that we could come up with given the  
5 complexity of the situation.

6 CHAIR McRAE: Very good. Well, we do  
7 have before us Order No. 7131.

8 COMMISSIONER CLARK: I move we adopt  
9 Order 7131 as proposed.

10 COMMISSIONER CONAWAY: Second the  
11 motion.

12 CHAIR McRAE: All in favor.  
13 Yea.

14 COMMISSIONER LESTER: Yea.

15 COMMISSIONER WINSLOW: Yea.

16 COMMISSIONER CONAWAY: Yea.

17 COMMISSIONER CLARK: Yea.

18 MR. CHERRY: Yea.

19 MS. COHEN: Yea.

20 CHAIR McRAE: Opposed? Very fine.

21 CHAIR McRAE: Okay. Now, moving on, the  
22 first item of business is a response to request for  
23 access to confidential information and motion for entry  
24 of a protective order.

1                   And here is how I would like to proceed  
2 with that. This motion is sponsored by Mr. Firestone.  
3 But I also know that there are bidders present who will  
4 want to comment on this, and Staff, and the Public  
5 Advocate. So, we will start, if we could, with  
6 Mr. Firestone.

7                   MR. FIRESTONE: Thank you, Madam  
8 Chairwoman. Good afternoon, Members of the Commission.

9                   I am here today on my motion regarding  
10 confidential information, and I am hoping this Commission  
11 will exercise its independent judgment based on its own  
12 rules and fundamental fairness.

13                   I first made a request for confidential  
14 information by E-mail to Mr. Howatt. On January 8th,  
15 Mr. Howatt sent an E-mail to all of the parties in this  
16 proceeding and asked for the bidders to respond to my  
17 request by January 12th.

18                   I want to thank Conectiv who filed a  
19 timely response. The same cannot be said for either NRG  
20 or Bluewater Wind. Neither of them responded to that  
21 E-mail.

22                   Another E-mail went out on January 30th  
23 after this motion was put on this Commission's docket on  
24 January 30th, again, asking the parties to respond. I

1 got one response just yesterday from NRG, and I learned  
2 as I was driving down here this morning that Bluewater  
3 Wind had filed papers, as well.

4 Now, the parties will claim, Oh, we're  
5 sorry we filed so late. But it would seem that  
6 fundamental fairness requires that parties not be filing  
7 things on the day of, particularly when they have known  
8 of this request since January 8th.

9 It is just highly prejudicial for me to  
10 be able to adequately respond to written legal briefs and  
11 arguments and case citations and attached cases when I  
12 get the brief as I walk in here just before the  
13 commencement of this hearing.

14 With that said, I would like to turn to  
15 the substance of the matter.

16 But first, the parties belatedly, in my  
17 mind, have raised the issue of standing. It was somewhat  
18 alluded to in NRG's papers, although not made explicit,  
19 sort of argued, that the same sort of standard should be  
20 provided. It was explicitly put forth in Bluewater  
21 Wind's filing.

22 And I would like to draw the Commission  
23 to an exchange of E-mails that I had with Robert Howatt  
24 and Karen Nickerson back on September 25th of last year.



1 I have provided copies to Mr. Geddes, and they have also  
2 been provided had to the bidders. That E-mail asked  
3 whether I had to formally intervene. And if so, who  
4 should I serve. And also asked about how I needed to go  
5 about serving motions. This was in advance of my, if you  
6 might recall, my motion for delay that I argued before  
7 the Commission back in October related to the October  
8 17th all day hearing.

9 In response, Mr. Howatt states, and I  
10 quote, in his E-mail, again, he sent it to me copying  
11 Karen Nickerson, This proceeding, by virtue of the  
12 legislative timing, is an expedited process without  
13 benefit of an assigned Hearing Examiner. All interested  
14 parties who have provided comment are, and in quotes,  
15 "official" parties to the proceeding.

16 MR. GEDDES: Professor Firestone. I  
17 hate to interrupt.

18 Can I give copies to the Commissioners?

19 MR. FIRESTONE: Oh, no. Go ahead.

20 I sent this, or engaged in this E-mail  
21 exchange precisely because I was intending to file my  
22 motion for delay, and I wanted to know whether I had to  
23 first intervene as a party, and I was told no I was  
24 already considered to be a party.

1           This Commission, then, heard my motion  
2     some time in early October. I think maybe some time  
3     around October 10th. I can't recall the exact date.

4           And I would note for the record that  
5     under the Commission rules, only parties to a proceeding  
6     are allowed to make motions.

7           No one objected. The Staff did not  
8     object. The Public Advocate did not object. The bidders  
9     did not object to the filing of that motion. And this  
10    Commission treated me as if I was a party and ended up  
11    denying that motion.

12          Subsequently, after our all day hearing,  
13    the Commission entered a proposed -- Staff entered a  
14    proposed order. I filed objections to entry of that  
15    order, and, again, the Commission, the Staff counsel, and  
16    all of the bidders treated me as if I was a party.

17          Subsequently, I filed a motion for  
18    rehearing and reconsideration. Again, under the  
19    Commission rules, only allowed by parties to the  
20    proceeding. No one objected to my status as a party, not  
21    this Commission, not Mr. Geddes, not the bidders.

22          And I would also point out that during  
23    the hearing on that, Commissioner Clark explicitly asked  
24    me, Why didn't I just go ahead and file a lawsuit, if I

1 was unhappy, something to that effect, I am not quoting  
2 Commissioner Clark, but why I was seeking rehearing. I  
3 don't have the transcript in front of me. I was not  
4 prepared for this argument because, again, I just  
5 received the argument this morning.

6 Again, it was because Commissioner Clark  
7 asked me that question precisely because everyone had  
8 always treated me as if I was a party. I have  
9 detrimentally relied on that fact, and I would submit I  
10 am a party to this proceeding, and it is really too late  
11 in the day for someone to object.

12 As for the argument that is made  
13 regarding standing, there is a citation to a Delaware  
14 case, which then relies on the U.S. Supreme Court case,  
15 Lujan versus Defenders of Wildlife, a 1992 case. Again,  
16 I haven't had time to fully address the standing issue  
17 because I just got this just before one o'clock. But for  
18 the record, that is no longer the leading U.S. Supreme  
19 Court case on standing. That case is Friends of the  
20 Earth versus Laid Law, 528 U.S. 167. I believe it is the  
21 year 2001 or so. And that case is a more relaxed  
22 standard of standing than is in the Lujan decision upon  
23 which is relied upon.

24 The parties, NRG and Bluewater Wind,

1 essentially, ask you to ignore, pretend as if Rule 11(e)  
2 does not exist. But Rule 11(e) does exist and it is your  
3 rule. And I would submit the Commission is bound to  
4 follow it rule. That rule says that any person that is a  
5 party can either through an appropriate agreement with  
6 another party, or if that's not able to happen, then a  
7 motion for a protective order issued by this Commission  
8 obtain confidential information.

9 And I would submit, this goes back to  
10 Commission Rule 11(a), which is when discussing whether  
11 the Commission might accord confidential treatment says,  
12 In support of such a request, such person shall attest  
13 that the information is not subject to inspection by  
14 either the public or by other parties, unless an  
15 appropriate proprietary agreement is executed.

16 I don't believe that any of the parties  
17 have even made that submission. So, at this point, I  
18 would say their confidential submittals don't even comply  
19 with the Commission's rule.

20 But 11(a) lends support, as well, that  
21 if you want to claim something as confidential, that  
22 other parties to the proceeding can get it under 11(a).

23 Now, NRG claims I haven't shown a  
24 recognized need for the information, and I can just rely

1 on this Commission and the other state agencies to  
2 evaluate bids.

3 NRG and Bluewater both confuse the issue  
4 of evaluators with parties.

5 None of the four state agencies are  
6 parties to this proceeding. They are the decision  
7 makers. They are not parties. And they don't represent  
8 my interest. They represent their own agency's interest  
9 and their own statutory requirements.

10 If these agencies, or if this Commission  
11 automatically represented my interest, then, no party  
12 would ever have the opportunity to intervene in any  
13 proceeding because we would always just assume that the  
14 Commission represented that party's interest.

15 I think I have demonstrated through my  
16 advocacy in this proceeding, that no party represents my  
17 interest, probably more than this Commission has  
18 thoroughly enjoyed. But I would submit that while the  
19 Public Advocate generally represents the public interest  
20 separate from this Commission, the Public Advocate has  
21 not always supported me in every argument, in every  
22 motion that I have filed.

23 And I would submit that as a matter of  
24 law, it has been certainly demonstrated as a matter of

1 fact in this proceeding that no party can adequately  
2 represent me.

3           There is nothing, as well, that would  
4 stop this Commission under Rule 1(b) from setting up a  
5 slightly different rule in this matter to bar other  
6 bidders from seeing the bids, the confidential nature of  
7 the bids of other parties. And it certainly can make an  
8 individual's determination whether to make the disclosure  
9 to me whether the interested information, if I got it,  
10 would likely harm the competitive position of any of the  
11 bidders.

12           Before I became a professor and got my  
13 Ph.D., I practiced law for 10 years. I was always a  
14 government lawyer. I have done consulting work since  
15 then. I have only consulted for public entities. I have  
16 not done any consulting for private entities. And,  
17 certainly, the disclosure to me as a licensed, currently  
18 licensed lawyer in the State of Michigan, if I was to  
19 improperly disclose this material, I could be subject to  
20 penalties from my own state bar.

21           I have certainly experience dealing with  
22 confidential materials. I understand the penalties for  
23 disclosure. And no one has made any showing that they  
24 would be harmed by a disclosure of information to me.

1 There have been some suppositions, Well, this is going to  
2 hurt my competitive position. But anyone has made a  
3 showing as to how disclosure of this information to me is  
4 going to harm them.

5 And I would lastly note, although, this  
6 memo went out on January 8th from Mr. Howatt, no other  
7 party in this proceeding has requested afforded like  
8 treatment. His notion that things are just going to  
9 snowball and everyone is going to want this information,  
10 it hasn't been shown as a matter of fact. And I think  
11 this Commission should follow the rules that it has  
12 itself written and should live by.

13 And I respectfully request that my  
14 motion be granted. Thank you.

15 CHAIR McRAE: Commissioner Winslow.

16 COMMISSIONER WINSLOW: Thank you, Madam  
17 Chair.

18 You're here as an individual. You do  
19 not represent an organization, correct?

20 MR. FIRESTONE: That's correct. I  
21 represent myself.

22 COMMISSIONER WINSLOW: Doesn't the Lujan  
23 case really talk to organizational standing not to an  
24 individual standing?

1                   MR. FIRESTONE: It does. The Lujan  
2 case, though, in order to get organizational standing  
3 under the law, however, an organization, for the most  
4 part, gets organizational standing by showing that its  
5 members as individuals have standing. And so, what was  
6 looked at in Lujan, this was a case that involved some  
7 individuals who, I think, I don't know if they wanted to  
8 go to "CR Leon," (phonetic) or somewhere to observe  
9 wildlife, but there was a civil war going on, and they  
10 did not make particular averment that they were actually  
11 likely to go to this country that was in the midst of the  
12 civil war.

13                   So, the organization was denied standing  
14 based on the individuals not being able to show that  
15 they, as individuals, had standing.

16                   COMMISSIONER WINSLOW: I just wanted to  
17 say, we're not dealing with an organization. And that  
18 was one of the grounds upon which they found it was not  
19 standing. Since you're not an organization, it is not  
20 really pertinent or relevant to our discussion here, I  
21 don't think. I just wanted to make sure that was clear.

22                   MR. FIRESTONE: I only brought that case  
23 up because it was brought up by Bluewater Wind.

24                   Again, those cases, whenever you are



1 doing an organizational standing reports tend, almost  
2 always, to discuss the factors that go into individual  
3 standing because of the relationship of organizational  
4 standing and individual standing.

5 COMMISSIONER CLARK: Sir, just so I  
6 understand.

7 How do you propose, as a proposed party,  
8 to have the line drawn, or have us draw the line between  
9 you and the bidders, once again? They're certainly  
10 concerned about each other s reviewing their information.  
11 Bluewater Wind is probably not going to want NRG looking  
12 at their information and vice versa throughout this  
13 process, their party and your party. I know you  
14 addressed that because I did not quite understand what  
15 your position was with regard to how you would draw that  
16 line.

17 MR. FIRESTONE: If the party in question  
18 -- if disclosure of the information to the party in  
19 question would not likely harm the competitive position  
20 of the party from whom the material is requested.

21 So, a bidder -- one bidder requesting  
22 confidential information from another bidder that could  
23 potentially harm the competitive position, not just in  
24 this particular case, but they may be bidding in other

1 circumstances and other places, as well. They are in the  
2 same business. They're competitors.

3 COMMISSIONER CLARK: One other question  
4 I have, and as parties address it, I would appreciate  
5 your response.

6 The RFP itself, can somebody refresh my  
7 recollection on what the provisions were in the RFP with  
8 regard to confidentiality of the pricing information and  
9 the bids? Was it laid out explicitly or not so?

10 MR. FIRESTONE: I don't believe so. I  
11 will turn it over to Mr. Geddes.

12 MR. GEDDES: I don't have the document  
13 in front of me. But it was clear the materials would be  
14 that there would be confidential materials submitted  
15 under the RFP. I believe the bidders who are here can  
16 speak to their understanding of what the RFP meant in  
17 terms of confidentiality.

18 MR. FIRESTONE: One other thing. I  
19 think there's distinction between different types of  
20 information that someone might claim is confidential.

21 Certainly, something along the lines of  
22 a trade secret or something that goes into the production  
23 process, how a machine works, the actual explicit design  
24 of the machine, when you get into those design aspects,

1 one can understand why a company would have concerns with  
2 that.

3 CHAIR McRAE: Isn't this discussion  
4 leading more to your second motion?

5 MR. FIRESTONE: It is. I agree that it  
6 does go in part to the second motion. But what I'm  
7 responding to is Mr. Geddes because to the extent that  
8 there was an understanding that things might be held  
9 confidential, it wasn't necessarily this broad brush that  
10 price, for example, might be kept confidential.

11 But in addition, these rules were this  
12 place at the time that everyone came forward and  
13 participated in this bidding process. And we all need  
14 and we all do detrimentally rely on this Commission's  
15 rules, not just on what is going on in a document.

16 CHAIR McRAE: Thank you, Mr. Firestone.  
17 If I can now hear from the bidders in  
18 this process.

19 Identify yourself for the record.

20 MR. MCGONIGLE: Madam Chair, Commission  
21 Members, Staff. I'm Tom McGonigle from the law firm of  
22 Wolf Block. I represent Bluewater Wind. I have here  
23 with me from Bluewater Wind, Peter Mandalstam.

24 MR. ROSENSTEIN: Madam Chair, my name is

1 I. David Rosenstein, appearing on behalf of Conectiv  
2 Energy.

3 MR. HOUGHTON: Madam Chair, Michael  
4 Houghton from the law firm of Morris, Nichols, Arsht and  
5 Tunnell of Wilmington, here on behalf of NRG.

6 CHAIR McRAE: I think that's all three.  
7 Why don't we start from this end and work our way across.

8 MR. MCGONIGLE: Madam Chair, as has been  
9 referenced, we submitted a letter this morning  
10 summarizing our position and do apologize for the  
11 tardiness of that letter. We were unclear as to the  
12 requirement of a written response, and, again, I  
13 apologize for the lateness of the letter.

14 Let me just start out by first saying  
15 that on behalf of Bluewater Wind, we have tremendous  
16 respect for Professor Firestone and the work he has done  
17 in this area. It's critical work. And our position  
18 today in no way reflects negatively on the value and  
19 quality of his work.

20 However, as a legal matter, we do  
21 believe that Professor Firestone does not have a direct  
22 interest in the evaluation of these bids for the purposes  
23 of Rule 11(e).

24 The Commission Rule No. 2 requires a

1 direct interest. In case law, in similar situations, it  
2 is analogous. It's not on point. But case law in  
3 similar situations requires a more particularized  
4 interest than Mr. Firestone has in this case.

5 Now, to be fair, Professor Firestone  
6 has, in fact, been afforded significant input in this  
7 process. He has filed motions as he indicated. And he  
8 has been involved with respect to this RFP.

9 But we do not believe the Commission has  
10 specifically ruled on this issue pursuant to Rule 21, at  
11 least as it relates to the evaluation of bids. And as a  
12 consequence, we think that Rule 11 (e) in this case does  
13 not apply and the motion should be denied.

14 Thank you.

15 MR. HOUGHTON: Madam Chair, Members of  
16 the Commission. I will try not to be redundant.

17 I guess I'm less inclined to be  
18 apologetic only in the sense that we weren't clear as to  
19 when we were to file a response. We think we did so in a  
20 timely manner consistent with when this matter was set  
21 down for proceeding.

22 And we also think to be fair to all of  
23 the parties who responded, the arguments here are not  
24 particularly arcane or complex and the authorities cited

1 were relatively limited. And I think Professor Firestone  
2 has demonstrated a laudable probability to grasp both the  
3 substance of the arguments and to respond to them.

4 As it relates to the particulars,  
5 interestingly, the Professor did note that we didn't  
6 address square on the notion of status. We did that for  
7 a couple of reasons.

8 One, there had already been a letter  
9 submitted by Conectiv raising the issues that, I think,  
10 we all three subscribe to that under Rule 11 for the  
11 reasons that have been articulated in the Conectiv letter  
12 and by Mr. McGonigle. There isn't the kind of peculiar  
13 and particular interest demonstrated here. And I don't  
14 think there has been a particular ruling or determination  
15 made. I do think there has been, obviously, an E-mail  
16 exchange. I don't think the E-mail exchange reflects a  
17 reason and conclusive decision by either a hearing  
18 examiner, and with all due respect to Mr. Howatt, with  
19 respect to a commissioner or Commission proceeding in  
20 determination on the issue.

21 But even putting that aside, I think we  
22 have to look generally at what the ramifications of the  
23 arguments are here. We got a competitive bid situation.  
24 A matter of significance to all three bidders. A matter

1 of significance to this state. We did rely on, among  
2 other things, Section 6.2 of the Delmarva Power and Light  
3 request for proposals and instructions to bidders, which  
4 provided that information could be designated  
5 confidential and would be treated as confidential subject  
6 to further review by the Commission and those acting on  
7 its behalf.

8 I think for Professor Firestone to  
9 suggest that nobody here, in not one, not two, but not  
10 three, but four, that's right, four government agencies,  
11 along with the Public Advocate, cannot represent or will  
12 not represent his interest, when, as President Bush may  
13 say, You are the deciders in this particular process  
14 strikes me as a bit overblown and, frankly, goes way too  
15 far.

16 I think you are all entrusted with the  
17 responsibility to fairly access these proposals. You do  
18 represent the public's interest and certainly the Public  
19 Advocate does.

20 As it relates to, again, issues of  
21 reliance and not to belabor the point. But my client,  
22 NRG, has not faced the circumstance anywhere else in  
23 which it has submitted bids. And we submit bids  
24 regularly. We submit around the country. We submitted

1 bids in Texas, in Connecticut, in New York and  
2 Massachusetts, and there has not been an instance where a  
3 member of the public is provided access to this extremely  
4 confidential information.

5 I understand that at some point in the  
6 near future, we will, in fact, be in Round 2, which is,  
7 essentially, a specific determination of whether the  
8 designations of confidentiality are appropriate, and  
9 there will be a process for airing that.

10 But, I think, it is fair to say, we  
11 would not have bid, and we would not maintain our bid  
12 under circumstances where this kind of information could  
13 be provided to the public. We don't think that there is  
14 a confidentiality order, or an agreement that could be  
15 entered into that would give us the comfort level that  
16 rightly or wrongfully, intentionally or negligently,  
17 proprietary and important information wouldn't find  
18 itself in the hands of people and put us at a significant  
19 competitive disadvantage. And we state as much in the  
20 letter.

21 So, in short, for reasons that are  
22 really, at least, derived from Rule 21, if not directly  
23 connected to Rule 21 and the kind of particular interest  
24 that any party must demonstrate, we don't think Rule 11



1 and 11 (e) was designed to provide access to information  
2 in this fashion.

3 I have functioned, along with Mr. Geddes  
4 and others, under the rules of the Commission, and  
5 including Rule 11 for many, many years. This is a first  
6 impression as far as I'm concerned. We've never had to  
7 encounter before anything other than the standard use of  
8 Rule 11, which is parties in, let's say, a rate case  
9 concerned about access to proprietary information, enter  
10 into an agreement, and consultants, the Public Advocate  
11 and others are provided access. This goes way too far  
12 and way too much and would put all of the bidders in this  
13 circumstance in a significantly detrimental situation.

14 Thank you.

15 CHAIR McRAE: Mr. Rosenstein.

16 MR. ROSENSTEIN: Thank you, Madam  
17 Chairwoman.

18 I guess one of the questions we have,  
19 and one of the things we raised in our letter is the  
20 applicability of Rule 11 in this case.

21 We believe that Rule 11 is typically  
22 used in a contested hearing. It is used to give all  
23 parties in the case access to proprietary information  
24 that one party intends to rely upon and is, basically,

1 used for due process purposes so that everyone can have  
2 access to information that one party is using.

3 Dr. Firestone has suggested that the  
4 information he is seeking would only be available to him  
5 and would not go any further.

6 Our concern, I guess, is that if Rule 11  
7 is applicable, which we don't believe it is, such access  
8 of one party is not the way that rule was used. It is  
9 used to give everyone the information.

10 Now, we don't believe that Rule 11 is  
11 applicable here because, at least, at this point, these  
12 bids are not a part of a contested proceeding. They were  
13 not captioned as being filed in a case. They were not  
14 intended to be filed in a case. They were sent to  
15 Delmarva and also to the consultants and the state  
16 agencies for their information.

17 Presumably, at some point, some of this  
18 information may find its way into a filing in a contested  
19 case. But, at least, at this point, we do not believe  
20 that any of these bids are part of the contested case or  
21 subject to the requirements of Rule 11.

22 They may very well be subject to  
23 requirements of Rule 10, which, I believe, requires that  
24 a state agency give access to certain information that it

1 finds in its files. And, in fact, some of this  
2 information is in state agency files at this point.

3 But Rule 10, specifically, does not  
4 permit disclosure of information that's trade secret or  
5 financially confidential. And we believe that much of  
6 the information in the bid does fall under the trade  
7 secret exemption and is not discloseable.

8 So, the question really in our mind is  
9 what falls within the trade secret exemption. We believe  
10 that the exemption is available for information that was  
11 developed by the efforts of a party, was treated as  
12 confidential by a party, and would put the party at a  
13 competitive disadvantage as disclosed.

14 The trade secret exemption is critical  
15 because it permits state agencies to gain access to  
16 certain information which is confidential, but does not  
17 expose the providers of that information to disclosure to  
18 their competitive disadvantage.

19 So, the trade secret exemption is  
20 working the way it's supposed to work, and that is, the  
21 agencies have gotten access to information that they need  
22 to do their job. And at this point, it has not gotten  
23 out into the public where it can do competitive  
24 disadvantage to those who provided it.

1           Conectiv Energy is a participant in the  
2 competitive wholesale electric market. We submit bids in  
3 response to solicitations for SOS supply. We offer to  
4 sell power to other market participants. We sell power  
5 to PJM on a daily basis and now we are participating in a  
6 process like this where we are offering to construct a  
7 plant for the use of this specific utility.

8           Participation in a market like that does  
9 not simply mean building a plant and turning on a switch.  
10 The fact is, we rely very heavily on certain strategic,  
11 intellectual capital that we build up over time. The  
12 type of information that we consider to be strategic,  
13 intellectual capital, the cost that we incur to produce  
14 power, the way in which we use our plants, the way in  
15 which we construct our plants, and our outlook as to the  
16 future of the electric and the fuels market.

17           If competitors were to gain access to  
18 this type of information, they would be in a position to  
19 structure their bids for business that Conectiv Energy is  
20 seeking in a way that would be disadvantageous to  
21 Conectiv Energy.

22           This is the type of information that we  
23 redacted from our proposal, and we believe is not subject  
24 to disclosure in this manner.

1 I would also note that we redacted  
2 certain information from our proposal, which we received  
3 on a confidential basis from vendors.

4 CHAIR McRAE: Let me just say this. The  
5 redactions are going to be the second piece of it. I  
6 would really like to focus on who has access at this  
7 point.

8 MR. ROSENSTEIN: That completes my  
9 statement.

10 CHAIR McRAE: Very fine. I will move to  
11 the Public Advocate.

12 MR. CITROLO: Thank you, Madam Chair.  
13 Members of the Commission. I also want to thank you for  
14 not asking me to summarize the Lujan case. I don't have  
15 any legal argument for you today. The four attorneys  
16 around me I think all appeared in Delaware Today at some  
17 point or the other as up and coming lawyers in this  
18 state. So, I'm not going to even attempt that.

19 What I would say is a couple of things.  
20 One, I speak to our statutory obligations and rights.  
21 Obviously, we do have access to that information. We  
22 feel that we represent the public that is embodied in our  
23 statute in these proceedings, and that is why the  
24 legislature has given us access to information such as

1 this under a blanket protective order.

2 We, of course, remind you that we're not  
3 actually part of the valuation slash determination  
4 process. I will let DNREC argue for that. They  
5 represent some of the members of the public who are not  
6 embodied in our statute.

7 The second thing I want to point out is  
8 one thing to be clear. I feel it's necessary to mention  
9 it for the record given any error of blogs and blanket  
10 E-mails being sent out.

11 The Public Advocate, although our  
12 statute does give us the right to view the information,  
13 we are not empowered to release it. So, we are not  
14 withholding anything from the public. We don't have that  
15 authority to release it, if asked.

16 Third, I think, obviously, we can't  
17 underestimate the significance of this case for all  
18 Delawareans. It's going to be watershed, depending on  
19 the determination in terms of the energy market in  
20 Delaware.

21 So, having said my first two comments,  
22 if this Commission were to determine that Dr. Firestone  
23 was a party, we would not be opposed to the protective  
24 order being assigned.

1           And secondly, we are not opposed to if  
2   this Commission were to decide to conduct a proceeding to  
3   have the parties demonstrate whether or not the  
4   information is confidential. I've been part of that  
5   typically in the past. As you know, we have treated  
6   information confidential, especially, matters between two  
7   -- not being a state contract -- these are two parties  
8   that are, as I said, not serving their contract on the  
9   state. It's two private parties.

10           And as I said, with that, I saw  
11   Mr. Geddes with his Highlighter and pen since I got here  
12   about 11:30, so I will end my comments there.

13           Thank you.

14           CHAIR MCRAE: Before I move to  
15   Mr. Geddes, there have been a few developments where  
16   persons have asked to speak before the Commission.

17           I believe Senator Bunting who has  
18   arrived wanted to address this discussion in general.  
19   It's not open to the public. I'm recognizing public  
20   officials. I also have a letter from Jack Markell. It  
21   is not open for public discussion.

22           Senator Bunting.

23           SENATOR BUNTING: Thank you, Madam  
24   Chairwoman. Thank you for the courtesy. Also, I would

1 like to thank my colleague, former Senator Winslow.

2 I have the privilege of representing the  
3 20th Senatorial District, which encompasses the Atlantic  
4 Coast line and all of Delaware's inland bays. And I have  
5 the privilege of 20 towns, excuse me, 10 towns, I don't  
6 want to add any more at this point.

7 But this responsibility I take very,  
8 very seriously. I was a very close friend of late  
9 Dr. Robert McMahon, who was a member of this Commission,  
10 and also the Chairman of this Commission. He took a  
11 strong position with me on deregulation and my opposition  
12 to deregulation some years ago that may have ultimately  
13 cost him his position on this Commission, I felt.

14 But I come to today, I think, for a  
15 matter that does concern me is the decision making  
16 process, which is going to be taking place. This is  
17 such, and I can't stress this enough, this is a  
18 generational decision that different bodies are going to  
19 make as to who is going to generate power not only for my  
20 district, but for the entire State of Delaware, as well  
21 as portions of Maryland.

22 I'm here today, and I didn't bring one  
23 of my briefcases with me today, but it's flowing over, I  
24 think, with information and responses from the public.



1 I would just ask of you, if there's any  
2 way possible to give the public as much information as  
3 can be possible for them to have input into this because,  
4 as I say, it's a generational decision that you'll be  
5 making, which will effect my district far beyond my  
6 tenure of office. And I had the privilege of serving  
7 this district for nearly 23 years.

8 But for the health, the safety and the  
9 citizens that I serve and the environmental issues that  
10 we face in my district, I would ask of you, and I know  
11 that all of you -- some of you that are sitting here very  
12 personally -- that this decision -- weigh all of the  
13 sides of this decision, or the information that you have  
14 when you make this decision. I'm hoping, as well, for  
15 the people that I serve that the decision be made not  
16 only be for the economy of my area, which will a have  
17 dramatic impact, as well, but the environmental impact  
18 and the health and safety of the citizens that I serve.

19 I thank you for allowing me the time.  
20 And, again, I honor the late Dr. Robert McMahon, who was  
21 a close friend, took a strong position, may have cost him  
22 his position on the Commission, and for a while I thought  
23 it was going to cost me my senatorial district.

24 Thank you.

1 CHAIR McRAE: Thank you. Mr. Muller, it  
2 is not a public comment session. There is also a letter  
3 from Jack Markell.

4 MR. MULLER: Madam Chair, we have  
5 participated in this docket from the beginning, really,  
6 to the same extent that Dr. Firestone has. And if you  
7 say we are not allowed to speak, I think you're making a  
8 very serious mistake.

9 CHAIR McRAE: Well, I'm saying that the  
10 motion we are addressing is not before public comment.  
11 That's what I'm saying, Mr. Muller.

12 You have had, and I think this has been  
13 a quite an open process, but does that not follow that  
14 everything is open. I was deferential and continue to be  
15 to our government officials who want to be heard at the  
16 table, but it is not a public forum today.

17 So, this is not an opportune time for  
18 you to speak. But there have certainly have been a  
19 number of occasions, and I assure you by virtue of the  
20 order that we passed just a few moments ago, that there  
21 will be further opportunity, but this is just to  
22 entertain a motion and it is addressing the affected  
23 group that I've identified at the table.

24 And I would ask that you respect that.

1 MR. MULLER: Madam Chair, I consider, as  
2 a representative of the public and as a citizen of  
3 Delaware, I am an interested party in this matter and  
4 ought to be allowed to comment on this motion.

5 CHAIR McRAE: Mr. Muller, I understand  
6 that you are an interested public person, but does that  
7 not mean that every proceeding is open to public comment.  
8 And this specific one is not.

9 And I would ask that you be respectful  
10 of the process.

11 UNIDENTIFIED AUDIENCE MEMBER: You are  
12 not being respectful of the public, by not permitting the  
13 public to speak. It's one person here.

14 CHAIR McRAE: If I may continue. I  
15 believe that Mr. Markell, Jack Markell, the state  
16 treasurer sent the letter and asked that it be read and  
17 he was going to have someone present. If he's not, I  
18 understand that Mr. Sheehy will do that in his absence  
19 for purposes of the record.

20 MR. SHEEHY: For the purposes of the  
21 record, the letter is from the Office of the State  
22 Treasurer, State of Delaware, dated February 6, 2007,  
23 addressed to Arnetta McRae, Chair, Delaware Public  
24 Service Commission, Jennifer Davis, Director, Office of

1 Management and Budget, Russell T. Larson, Controller  
2 General, John E. Hughes, Secretary, DNREC.

3 I understand the Public Service  
4 Commission will be hearing testimony on February 6th  
5 regarding the significant amount of material redacted by  
6 bidders in connection with their proposals to supply  
7 electricity in Delaware.

8 This redacted information includes the  
9 offered price of energy and capacity, emissions rates and  
10 other basic information.

11 The intent of the bidders is to obtain  
12 long-term power purchase agreements for Delmarva Power's  
13 Standard Offer Service.

14 The amount of information presently  
15 withheld would tend to preclude in-depth public  
16 participation in the evaluation and decision-making  
17 process.

18 The evaluation of these bids is  
19 extremely important to the future energy supply of  
20 Delaware, the quality of our environment, and to the  
21 pocketbooks of many of our citizens. Surely this  
22 proceeding represents a case where the public interest is  
23 paramount.

24 While I understand that there are cases

1 where the release of proprietary information may be  
2 damaging to the bidders, I urge the Commission to err on  
3 the side of more disclosure rather than less.

4 Sincerely, Jack Markell, State  
5 Treasurer.

6 CHAIR McRAE: Mr. Geddes.

7 MR. GEDDES: Madam Chair, Members of the  
8 Commission.

9 Let me try to put the arguments in  
10 context because I think it is important to understand the  
11 framework before you try to decide how to move forward  
12 with this motion.

13 As Professor Firestone has cited to you,  
14 there are some rules that the Commission has that  
15 regulate its procedures. Those procedures normally are  
16 rate-making procedures and follow as one represented  
17 stated a format. And there are reasons why parties are  
18 allowed and provide confidential information.

19 But you also have rules that require  
20 certain determinations before parties status is afforded,  
21 and that is Rule 21 and Rule 2, which have also been  
22 cited to you.

23 And if you look although the E-mail that  
24 Professor Firestone placed before you and that he shared

1 with me just before the start of this hearing, it is  
2 clear that Mr. Howatt was attempting to identify and to  
3 tell all individuals that this was an expedited process.  
4 That we were going to move forward as if everyone was a  
5 party. To allow the most participation of anyone who  
6 wanted to participate in whatever level they wanted to  
7 participate. And that has been the rule through this  
8 process up to today.

9           Because this is the first time that Mr.  
10 Firestone, other than the motions he filed before, has  
11 requested information that has been denied him. And so,  
12 he has not been prejudice. He has not in any way had his  
13 rights affected because this Commission has not  
14 considered this issue. And the only person or persons  
15 who can grant party status are, one, the hearing  
16 examiner, and the Commission.

17           Now, the fact that he has operated de  
18 facto as a party does not decide the issue that is before  
19 you. So, you have two choices here. You can say, Well,  
20 Professor Firestone, you raised an interesting issue. It  
21 really hasn't been joined properly. The parties go back  
22 and now I would like at the next meeting to have the  
23 parties' position on why he should or should not be a  
24 party. I think orally you received that information, but

1 maybe you want additional writings on the issue of  
2 whether he has standing in this proceeding.

3           Some of the materials have been late  
4 filed. That is true. Unfortunately, the memo that went  
5 out was dated January 30th. And there was no response  
6 date asking a response by a particular date. If you feel  
7 that Professor Firestone has been prejudice by that, you  
8 should say, we will continue this, allow him the  
9 opportunity to respond to those materials and we will  
10 come back and reconsider this.

11           Or third, you can decide that you have  
12 heard the parties and you believe that you have  
13 sufficient information to make a decision on this point.  
14 And this is the context.

15           This Commission has bent over backwards  
16 to try to make these processes as transparent as  
17 possible.

18           If you recall the SOS process, we went  
19 through one tranche, the Commission ordered the Staff to  
20 go back and say, Look, is there a way that we can make  
21 this more transparent for the public. There was a  
22 hearing examiner's report and the Commission entered an  
23 order, Order 7053 in October of last year in which the  
24 hearing examiner over the strenuous objections of some of

1 the bidders said, Yes, there is a way that we can do  
2 this. The information will be made available more  
3 quickly and more information will be made available to  
4 the public. That's the context.

5 This Commission is not historically a  
6 Commission that tries to keep information from the  
7 public. And this Commission historically has tried its  
8 level best to be as transparent as possible.

9 However, this is not a normal  
10 rate-making proceeding. This is a competitive bidding  
11 process. And I think the rules, the normal rules that  
12 the Commission abides by in a normal rate-making  
13 proceeding in this case, need to take a second chair, if  
14 you will, to protecting the process.

15 Now, you have heard from some of the  
16 bidders that said that they relied specifically on 6.2  
17 of the instructions to bidders, which Commission Clark  
18 asked about that clearly state and suggest that  
19 information will be kept confidential.

20 Now, they relied on that. And they bid  
21 pursuant to that. And I think this Commission would be  
22 hard pressed now to change those rules in the middle of  
23 its evaluation with the other state agencies of these  
24 bids. The reasons why this is important have been



1 clearly recited by the other parties.

2           So, I think the Commission needs to be  
3 very careful. So, yes, it needs to provide as much  
4 information as it can to the public to be as transparent  
5 as possible. But the Commission is also charged with  
6 protecting the process. And only the state agencies are  
7 the evaluators. The members of the public are not. The  
8 legislation was written in such a way that the agencies  
9 make the decision, not the members of the public.  
10 Clearly, the members of the public can comment. Clearly,  
11 they can participate. They have.

12           But with regard to this information,  
13 which is sensitive, I think you need to err on the side  
14 that you make sure that the process of receiving these  
15 bids and having them evaluated is not tainted in anyway.  
16 I think that that should be your guiding star through  
17 this process. If you want to have more consideration of  
18 Professor Firestone and Mr. Muller's standing as parties,  
19 clearly that is possible. And clearly, you can create a  
20 process to do that.

21           At the end of this day, this is your  
22 process. It's your decision. If you feel comfortable  
23 with the information you have before you, make the  
24 decision. If you want additional information, ask the

1 parties to provide it. There is plenty of time we can do  
2 this. I believe there is going to be a proposed schedule  
3 on the second motion that would have this before the  
4 Commission on the 27th. You can certainly have Professor  
5 Firestone's issue as to whether he has standing as a  
6 party presented at the same time.

7 CHAIR McRAE: I just want to clarify,  
8 you said both Mr. Firestone and Mr. Muller. I don't  
9 believe Mr. Muller has made a claim for standing.

10 MR. GEDDES: That is correct. I did not  
11 go into details. But I do not believe Professor  
12 Firestone is any different than Mr. Muller or any  
13 different than any other member of this public in terms  
14 of representing a special interest.

15 I think if you were to hypothetically  
16 grant Professor Firestone's motion to be treated as a  
17 party and to allow him to sign a confidentiality  
18 agreement to present this information, Mr. Muller could  
19 ask for that. Mr. Kempton could ask for that. Any  
20 member of the public could asked to be similarly treated.

21 I do not think there is a distinction,  
22 even though that both gentlemen have participated, and  
23 there is only one motion before you, I grant that, but  
24 I'm just saying hypothetically, if you grant Professor

1 Firestone's motion, I think there is no reason why  
2 somebody else, member of the public, could not come  
3 before you and say, I would like to receive that  
4 information, as well.

5 COMMISSIONER CLARK: Just a question,  
6 more of a point of order. But the second motion that we  
7 are talking about at the next meeting will be how to  
8 generally deal with confidential information and try to  
9 get that out as quickly as possible.

10 CHAIR McRAE: That's on the agenda for  
11 this meeting, as well.

12 COMMISSIONER CLARK: I would like to  
13 defer a decision on this and get a macro sense of what we  
14 are dealing with.

15 CHAIR McRAE: That is also on the agenda  
16 for today. We can take the discussion on both, the  
17 arguments, and then decide them both if that would help  
18 you for clarity.

19 COMMISSIONER CLARK: Yes.

20 CHAIR McRAE: I see the other  
21 Commissioners seems to be on board with that. Why don't  
22 we then proceed.

23 And the second motion has to do with the  
24 scope of --

1 MR. FIRESTONE: Madam Chair, may I have  
2 a brief opportunity to reply before we move onto the next  
3 motion.

4 CHAIR McRAE: Yes. Certainly.

5 MR. FIRESTONE: The parties have said,  
6 this isn't the way it is typically done. It's only been  
7 in contested cases before.

8 Well, the fact that no one has asked for  
9 this type of information before doesn't mean that it is  
10 not legally required under the Commission's rules in this  
11 kind of proceeding.

12 There is always going to be a first of  
13 anything. And the fact that it hasn't been done before  
14 doesn't change your decision or shouldn't influence your  
15 decision one way or the other. Either it is allowed  
16 under the Commission's rules or it is not.

17 I would also state that none of the  
18 parties, as I have suggested, have indicated in any way  
19 how the disclosure of confidential information to me,  
20 under a confidentiality agreement, would harm them  
21 competitively.

22 Third, Mr. Geddes talks about Section  
23 6.2 that the parties thought that this material was going  
24 to be treated confidential under the RFP. I'm not

1 suggesting in this motion that the information is not  
2 confidential.

3 Indeed, 11 (e) does not say the material  
4 isn't confidential. It says, notwithstanding the fact  
5 that the material is confidential and not otherwise  
6 discloseable to the public.

7 A party to the proceeding may, through  
8 an appropriate agreement, or by a protective order, gain  
9 access to that information.

10 So, the fact that the RFP says it's  
11 treated as confidential is wholly consistent with Section  
12 11 (e) which I have relied on and I have participated in  
13 these proceedings.

14 Lastly, this notion that I can be  
15 adequately represented because there are four state  
16 agencies, again, completely misunderstands the difference  
17 between intervention and decision making.

18 Intervention deals with a party. And  
19 the standard, while it is true under Rule 2, direct  
20 interest for an intervenor, you really have to look at  
21 Rule 21 as to what that standard of direct interest is,  
22 and that will not be adequately represented by the  
23 parties to this proceeding or why participation in the  
24 proceeding would be in the public interest. That's the

1 standard.

2 And, I think, again, it has been quite  
3 clear through these proceedings that no one here has been  
4 able to adequately represent my interest in this matter.

5 Thank you. I will await until we have  
6 discussed the other motion.

7 CHAIR McRAE: Also, since you have the  
8 floor, and you also are the sponsor of the next motion,  
9 why don't we just continue into that discussion.

10 MR. FIRESTONE: Now, we have before us  
11 the motion for a proceeding to determine the legality of  
12 the redaction.

13 This, again, is pursuant to Rule 11.  
14 And as I pointed out previously, the parties under Rule  
15 11 were supposed to, and maybe they have, I haven't seen  
16 it, they were supposed to attest that the information  
17 there was, in fact, confidential.

18 I have reviewed the bids, and it looks,  
19 to me, like most of the information, or much of the  
20 information that's pursuant to a decision by this  
21 Commission has been redacted. Everything to do with  
22 price. You know that I argued, as hard as anyone, that  
23 price shouldn't be considered. This Commission and DNREC  
24 decided otherwise. Gave it 33 points and all of the

1 parties have redacted price. Parties have redacted  
2 capacity factor.

3 NRG seems to go the farthest. They  
4 redact portions of the table of content. They redact  
5 individual words and sentences. They redact what they  
6 think the environmental emissions are going to be as far  
7 as particulate matter, Volatile organic compounds,  
8 mercury. That's all away from the public's view.

9 And I suggest that this level of  
10 redaction is not lawful and requires a proceeding by this  
11 Commission, pursuant to Rule 11. That the parties, and I  
12 want to say that, I think, the schedule that is laid out  
13 by Staff in their memo is appropriate. I would ask that  
14 this Commission put sort of a further gloss on that,  
15 consistent with my motion, and make it clear to the  
16 bidders that what they're required to do is not just to  
17 say it's all trade secrets. That for each and every  
18 redaction, one, they need to summarize what has been  
19 redacted without disclosing the confidential nature of  
20 it. And then, secondly provide a justification.

21 Similar to what would be done if parties  
22 in litigation wanted to withhold something, you would  
23 have to provide enough information on the subject matter  
24 so a determination -- otherwise, we won't be able to

1 adequately respond pursuant to the schedule that is laid  
2 out, unless the parties make a real showing individually  
3 on each and every redaction.

4 Thank you.

5 CHAIR McRAE: Okay. We will follow the  
6 sequence again of bidder responses.

7 MR. McGONIGLE: Thank you, Madam Chair.  
8 Again, Tom McGonigle representing Bluewater Wind.

9 Let me first say that Bluewater Wind  
10 very much supports and recognizes the importance of  
11 public input and review of this process. And to that  
12 end, we do not oppose the commencement of proceedings as  
13 has been requested in Mr. Howatt's memo dated January 30,  
14 2007.

15 We do suggest that the PSC consider  
16 extending the time line for responses by bidders a couple  
17 of days, maybe a week, not necessarily moving the hearing  
18 date back, but at least give us a little bit more  
19 additional time to respond. I think the current due date  
20 is next Monday.

21 We suggested this not to provide more  
22 time for refining legal arguments against disclosure, but  
23 rather for the bidders. And we suggest to go back and to  
24 take a second, perhaps, more thoughtful look at the



1 submissions with an eye toward releasing some of the  
2 documents previously submitted that were labeled  
3 confidential.

4 The reality is, I think, as we all know  
5 and all recognize, the statutory time frames for this RFP  
6 were incredibly compressed. And it may well be some of  
7 the decisions made with respect to confidentiality under  
8 the extreme press of those deadlines are worth a second  
9 look.

10 Bluewater Wind for its part is committed  
11 to doing just that. But, I think, providing some  
12 additional time to do so will serve this process well.  
13 At the very least, it may well alleviate some of the  
14 issues the Commission may consider at its next meeting.

15 Again, thank you for the opportunity to  
16 comment on this motion.

17 MR. HOUGHTON: Madam Chair, Members of  
18 the Commission.

19 NRG, likewise, supports the concept of  
20 public input and review. We are aware of and are  
21 supportive of a schedule being fixed that will permit  
22 input and review.

23 We would not oppose a modification of  
24 the proposed schedule, as Mr. McGonigle has suggested, as

1 long as it does not significantly defer or postpone the  
2 tight time frame that we're all functioning under.

3 We, as well, believe it would be useful  
4 to have time to go back and look at what our  
5 comprehensive redactions that we have engaged in, and  
6 they were comprehensive because our proposal, if we say  
7 so ourselves, was incredibly comprehensive.

8 It is a proposal we have been working on  
9 as a general matter for IGCC's for over two years. We  
10 have considerable expertise and have worked with many,  
11 many different vendors and have spent, as you might  
12 anticipate, many, many millions of dollars to both  
13 establish this position and the expertise with respect to  
14 IGCC.

15 So, I would like to echo what Mr.  
16 McGonigle has said, but also, let me caution in this one  
17 regard.

18 I would suggest that it might be  
19 appropriate, as we move forward, to provide some  
20 flexibility in the process for us to try to work through  
21 inevitably as we will the particulars and the mechanics  
22 of designation and discussion item by item.

23 I hear what Professor Firestone has  
24 said. But I think there will inevitably be a need on our

1 part to try to work through with the parties and with  
2 staff the nature, the extent, and the scope of the  
3 explanations with respect to redactions.

4 And with that general request, for  
5 patience and for cooperation, I conclude.

6 CHAIR McRAE: Mr. Rosenstein.

7 MR. ROSENSTEIN: Thank you, Madam Chair.

8 Like the other two parties, we,  
9 certainly, have no objection to going back and providing  
10 and explanation and basis for the redactions that we have  
11 done. And, I guess, I would also ask for maybe a day or  
12 two extra in order to complete that.

13 CHAIR McRAE: I would say this. There  
14 is always a preference for more rather than less  
15 disclosure and any measure that's going to lead to that  
16 certainly has value to the Commission.

17 I need to look to Staff around -- you  
18 know -- we have numerous -- this docket, as you know, and  
19 all of you have commented is traveling very, very fast.  
20 So, we need to look at it in the framework of whatever is  
21 our schedule.

22 MR. GEDDES: I am prepared to address  
23 some new dates once the Department of Public Advocate has  
24 spoken.

1 MR. CITROLO: Thank you, Madam Chair.  
2 One or two things that I want to remind the Commission of  
3 what I said earlier.

4 This particular motion we do support  
5 commencing the proceedings. One comment with that. The  
6 kind of joke here, our work here is simply so dry, you  
7 don't see people around. Perhaps, we did get caught a  
8 little offguard with the public interest. We welcome it.  
9 I think it's just we don't see it.

10 I also wanted to remind everyone for the  
11 record, this Commission did grant our request to include  
12 and add public comment sessions to the IRP docket in  
13 which we will have one in each county. And at Mr.  
14 Cherry's suggestion, you also adopted that same process  
15 for the RFP docket, which we will have then a total of  
16 six, at a minimum of six state-wide sessions for the  
17 public to provide comment in both cases.

18 Thank you.

19 CHAIR McRAE: I would note, as  
20 Mr. Geddes said, though, we weren't exactly caught off  
21 guard because the Commission was mindful, even earlier of  
22 the public interest. And, I think, he said it was built  
23 into the process.

24 MR. CITROLO: Yes. I was speaking about

1 August 18th, when I showed up at Legislative Hall, and  
2 there was much, much more public participation, and I  
3 have only been here five years, but certainly in those  
4 five years.

5 COMMISSIONER CLARK: Just a question,  
6 and I know we are coming around to Mr. Geddes, but  
7 something so I can have my hands wrapped around it  
8 correctly.

9 When we are talking about having public  
10 meetings and all, it will be difficult, at least, I  
11 recognize, and I'm sure the other Commissioners do, it  
12 will be awful difficult for the public in their own mind  
13 to weigh what's going on without having a good handle on  
14 what prices are involved with it.

15 And as I go through this process, and I  
16 think Mr. Geddes may be proposing a schedule, or there  
17 may be some talk between the parties to do that, but that  
18 is something that somehow we need to try to do everything  
19 that we possibly can so people can get out there to  
20 review it, also being mindful of some of the important  
21 proprietary information that needs to be protected, as  
22 well. I don't know. At this stage, I will be anxious to  
23 see what Mr. Geddes is proposing.

24 CHAIR McRAE: Even so, I think the

1 bidders will probably have more of a response in that  
2 regard. Mr. Geddes may work out a schedule. But I am  
3 not sure he will work out the answer to that statement.

4 MR. GEDDES: If I may make a comment,  
5 Madam Chair, since it is my turn.

6 I think what you are seeing here is sort  
7 of a classic example of what compressed time lines cause  
8 parties to do.

9 There was, obviously, a great deal of  
10 activity and flurry to try to get these bids in because  
11 of the tight time frame that was mandated by the  
12 legislation.

13 And now, all of the parties, and I'm  
14 happy to hear this, as well as see it, say, all right in  
15 an effort to get this material to you, we, obviously,  
16 took a rather large black marker to our proposals to make  
17 sure that sensitive information was not disclosed without  
18 us thinking about it.

19 Now, upon reflection, I think all of the  
20 parties are willing to go back and take a look and make  
21 sure what they did redact was appropriate. And I'm glad  
22 that they have agreed to some kind of schedule. I think  
23 it is very unfair to ask this Commission to decide these  
24 fact sensitive issues with no response to Professor

1 Firestone's motion.

2                   So, I'm happy to hear that all of the  
3 parties support the proposal. And in response to  
4 Bluewater Wind's request for additional time, I would  
5 suggest to the Commission, and, perhaps, they want to  
6 comment, that, perhaps, we extend the response date until  
7 the 15th of February, rather than the 12th and have reply  
8 responses on the 22nd, which would give the parties three  
9 additional days to try to analyze their redactions and  
10 provide meaningful information so that people can  
11 respond.

12                   And to follow up on Commission Clark's  
13 point about the town meetings. Yes, I think that's true.  
14 But to the extent that this is an iterate process, and we  
15 wind down on what really is confidential trade secret and  
16 otherwise needs to be protected, there will be more  
17 information for the public to have to understand and,  
18 perhaps, comment on.

19                   Again, the public is there through their  
20 comments to provide additional context for you as  
21 decision makers. They are not there to make the  
22 decision. They are not there to say, Well, this is a  
23 good price. That's a bad price. Why isn't it two cents  
24 lower or five cents higher. That's the agency's job.

1 But they are there to provide context in  
2 this process for you to consider when do you what the  
3 legislature has asked you to do, and that is to evaluate  
4 these bids. So, hopefully, as we work through all of  
5 this, we will get more information to the public and that  
6 their role will be meaningful in terms of these town  
7 meetings.

8 COMMISSIONER CLARK: Madam Chair,  
9 briefly. And I know Mr. Houghton has a question or  
10 comment.

11 But as you go through this process that  
12 is being proposed, for my information, the one thing I  
13 would like to see come out of it, if you take this to its  
14 conclusion, we may have a situation where we can't  
15 release what these prices are until after the final vote  
16 in June. And that causes me a lot of discomfort. I  
17 mean, to have to go that route. That may be what has to  
18 be done. It may not be. But I would like the parties to  
19 focus on that and maybe that snapshot of information  
20 that's going to be very important in why that can't be  
21 disclosed, why that is confidential, or from the other  
22 side, why it should be disclosed, and why it would not  
23 harm the companies.

24 Bottom line price, for instance, I guess



1 a lot can be extrapolated from that if you're a bidder,  
2 and that may put a big hardship on you. But I would like  
3 to see that fleshed out in this record and in this  
4 comment process because I will be reading that very  
5 carefully.

6 CHAIR McRAE: Well, there are other  
7 issues I think that may be of equal importance to some  
8 parties. Clearly, we would be asking the bidders to  
9 stretch themselves to the extent that the law permits.  
10 Price is one issue. But there, clearly, are a number.

11 COMMISSIONER CLARK: Environmental  
12 issues.

13 CHAIR McRAE: Yes. Environmental being  
14 yet another. So, I think this opportunity for a second  
15 look might have the bidders examine a number of items  
16 that might be a public interest and whether, in fact, the  
17 harm is such that it can't be disclosed.

18 MR. CHERRY: Madam Chair. I just want  
19 to seek some understanding of what the discussion has  
20 been here.

21 The bidders have suggested that they  
22 would go back and take a second look at what they  
23 redacted in their bids. And I'm sure that is welcomed.  
24 But is there a proceeding that is being opened before the

1 Commission and the state agencies where we would then use  
2 the legal counsel or the Public Advocate or somebody else  
3 to sort of stand over their shoulder or to double-check  
4 their perception of what ought to be redacted. Where is  
5 the decision made? I don't understand all of the process  
6 here. Where is the decision made that the redactions  
7 that they have made are, in fact, allowable or consistent  
8 with the Freedom of Information Act.

9 CHAIR McRAE: Well, there is a process.  
10 I don't know if Mr. Geddes referred to it. But we set a  
11 time line around -- I think there were some dates which  
12 may need to be adjusted -- where we would be looking at  
13 those very questions.

14 MR. CHERRY: We would, then, be  
15 overseeing that process.

16 CHAIR McRAE: Let Mr. Geddes clarify  
17 that.

18 MR. GEDDES: Madam Chair, Members of the  
19 Commission, and other agencies.

20 Let me say this. At the moment, it is  
21 unclear whether that will be necessary or not. This  
22 schedule tries to do it the efficient way, which is,  
23 Let's have a response to Professor Firestone's motion  
24 with specific examples of why redactions are necessary

1 with explanation and show where they are and have an  
2 explanation and have a response from Professor Firestone  
3 on the information that is received.

4 Now, that's going to do one or two  
5 things. That's going to create the issue in a way that  
6 you can resolve it. Or, as you suggest, there might have  
7 to be further proceedings, where an individual is hired  
8 by the Commission to look through this specific  
9 information and to make an independent determination as  
10 to whether the particular redactions are appropriate.

11 Staff was hoping to avoid that second  
12 step. And given the shortness of time we propose this  
13 step as an initial step. Even if this step doesn't work  
14 to finally resolve the issue to the Commission's  
15 satisfaction, it may provide information to all parties  
16 and hopefully narrow some of the issues.

17 For instance, presumably, there will be  
18 some materials that are no longer redacted that will come  
19 forth. There will be some materials, and I assume price  
20 will be one of them, that will still be redacted, and the  
21 reasons will be obvious.

22 Then, it will be for the parties to come  
23 before you and say, No, this is not sufficient. We need  
24 to go further, and that may be the conclusion. Or I'm

1 hopeful that there will be enough information that the  
2 Commission can make the decision then. But again, it is  
3 the Commission's decision.

4 You are the one and the other agencies  
5 that have to make the decision, and this process is an  
6 initial step in making an iterative step and the fact it  
7 may have to be followed by this second process. But at  
8 the moment, it is a start.

9 CHAIR McRAE: Does that address your  
10 question?

11 MR. CHERRY: It does. It does. And  
12 looking at this as an iterative process, we will go back  
13 to the drawing board and see what we get and we will take  
14 it from there. That seems like a reasonable course of  
15 action. Although, we don't have all that much time to  
16 have this tennis match. We need to get on with the  
17 decisions. The bids are fresh. They're getting stale.

18 MR. GEDDES: A comment. The process  
19 about reviewing the bids will go on. It is a question of  
20 what the public is allowed to see as the process unfolds.

21 MR. CHERRY: But the more time we take  
22 in our proceeding to get to the ultimate answer, the  
23 shorter time the public will ultimately have with the end  
24 answer between getting the answer and the time of the

1 first public meeting, for instance.

2 MR. GEDDES: Well, my thought would be  
3 that if there is a second step, that will be completed  
4 within 30 days from the 27th.

5 MR. CHERRY: One other thought. I just  
6 got to get it out. Commissioner Clark has talked about  
7 price, as has Mr. Geddes.

8 I understand that price is a critical  
9 issue, and there are lots of things in these bid that  
10 folks want to keep under wraps for very good reasons, I'm  
11 sure in conformance with FOIA.

12 But as an agency looking at this and  
13 making this decision, I cannot imagine, I cannot imagine  
14 a situation where we would be asked to make a decision  
15 without knowing what the end of the day price is going to  
16 be for the ratepayers of this state. Whether it is 12  
17 cents a kilowatt hour or 10 cents or whatever, just to  
18 get that out on the table, I know that I am going to be  
19 looking for that information in the independent  
20 consultant's report, where he is hired by the agency to  
21 boil all of this down.

22 And I know the public is going to be  
23 interested, and I want to hear what the public has to say  
24 about spending so many cents for wind, or so many cents

1 for coal, whatever, that ultimate comparison is going to  
2 be. So, I would expect price to be out there.

3 And to the bidders, I would expect price  
4 to be out there to the extent you can share it, I would  
5 expect to see it.

6 COMMISSIONER CLARK: We're charged with  
7 making the decision. But we are ultimately answerable to  
8 the public. That's a concern I got. I really want to  
9 get down to the nitty-gritty and hear the arguments as to  
10 why. I got a feeling in my stomach that we should go in  
11 that direction that Mr. Cherry suggested.

12 MR. SHEEHY: Madam Chair. Staff would  
13 like to recommend that the parties, when they do their  
14 analysis of what has been redacted, and why it has been  
15 redacted, perhaps, get some sense in terms of the amount  
16 of time that this information remains sensitive. There  
17 is information that clearly becomes stale after a certain  
18 period of time, or if there is a construct where that  
19 information be released in terms of ranking, as opposed  
20 to specific pieces of information, something that would  
21 allow the Commission to derive the maximum amount of  
22 information without creating the ultra sensitive  
23 commercial trade secret issue.

24 We clearly know that there is

1 information that would become stale the day after the  
2 bids. There may be information that becomes stale as new  
3 indices come out, whatever process is in place.

4 So, I would ask the parties to look to  
5 that and provide an indication as to what pieces of  
6 information might become available earlier versus later  
7 versus never.

8 CHAIR McRAE: Mr. Firestone.

9 MR. FIRESTONE: Madam Chair. I had  
10 understood based on the Staff memo that there was going  
11 to be a proceeding on the 27th of February to go through  
12 and look at these and determine that.

13 I think that timing is critical. I  
14 think the process that's going to be ongoing in March is  
15 the first town meeting the first week in March and public  
16 comment due by March 23rd. If we wait another month to  
17 determine what is releasable to the public, the public  
18 will never have an opportunity to comment on that  
19 material because the public comment period will have  
20 already gone over.

21 And so, first that's my first point.

22 CHAIR McRAE: But can I just clarify  
23 that. Are we talking a month here? I thought we were  
24 talking about a couple of extra days.

1 COMMISSIONER CLARK: Just in the comment  
2 period.

3 MR. GEDDES: We are. Yes and yes. We  
4 are talking about changing the dates that were submitted  
5 to all of the parties for responses due the 15th and  
6 responses -- some of the comments from the bidders -- and  
7 also response replies on the 22nd.

8 The phase two proceeding, which I  
9 referred to as phase two was in response to Mr. Cherry's  
10 comments was with regard to what if. And I'm hopeful  
11 that what if is not going to happen. But if it does, we  
12 will have more information on the 27th than we have today  
13 and be in a better position to decide what next to do.

14 Unfortunately, as you can hear from some  
15 of the comments today, this is all not tied up with a  
16 neat little bow. We're sort of, as we're going along,  
17 trying to keep the process moving, but also provide and  
18 be flexible to provide additional avenues of relief or  
19 interest that the parties have. And so, I can't say it  
20 is a perfect puzzle, but we are doing the best we can,  
21 another famous presidential quote.

22 MR. FIRESTONE: What I'm suggesting is  
23 that the 27th be a day when decisions are made, not a  
24 status conference on where we are on redactions.



1                   MR. GEDDES: But Professor Firestone,  
2 this is, in essence, to your benefit. This schedule  
3 brings this matter before the Commission with this  
4 material. And whether that's going to be sufficient or  
5 not will probably be something that you will have the,  
6 shall we say, the most interest in, because either the  
7 information is going to be satisfactory to you or it's  
8 not. And I would assume at that point you are going to  
9 ask the Commission to do something. And so, hopefully  
10 this provides enough information so that the request to  
11 the Commission can be agreed to by all of the parties.

12                   CHAIR McRAE: It tightens the schedule.  
13 But my understanding is, we are allowing a few more days  
14 to have a complete review to sort out what's left.

15                   MR. FIRESTONE: I don't object to them  
16 getting a few more days to that.

17                   But the question is, what happens on the  
18 27th.

19                   On the 15th, under the revised schedule,  
20 they are going to provide their amended redactions and  
21 their redaction justification.

22                   Then on the 22nd, we will have an  
23 opportunity to respond.

24                   What I am saying is, on the 27th, there

1 should be a ruling on whether the material is  
2 confidential or not. We don't need another status  
3 conference on what's going on. It will be clear based on  
4 the filings on the 22nd whether we concur, what areas we  
5 concur and what areas we don't.

6 I will also say that I am certainly open  
7 to discussing between now and then with any of the  
8 bidders information that we may be able to agree can be  
9 kept confidential and things that we disagree. I'm not  
10 necessarily opposed to narrowing the grounds of  
11 disagreement. I'm happy to work with it.

12 CHAIR McRAE: Well, what's left open in  
13 my mind on that, though, if we get to the 15th, and there  
14 is some further discussion, we're talking about the  
15 alternative approach that Mr. Geddes referred to, but we  
16 have to get somebody to take a look. That will also  
17 require time. I don't know that it necessarily could be  
18 decided on that date. We get the feedback, and it may be  
19 that we need additional resources to further flush it  
20 out. When I asked earlier about the time window, it was  
21 to more or less see if we have to go beyond, here is the  
22 data, and whatever procedure we have to follow, how do we  
23 fit all of that in to make it happen before we get into  
24 the public discussion.

1                   And I don't know if we need to get  
2 further clarification on that. But my understanding is,  
3 it may well involve our having to have another component  
4 of the process.

5                   Did I not understand that correctly?  
6 Commissioner Winslow.

7                   COMMISSIONER WINSLOW: Thank you, Madam  
8 Chair. There's somebody on Staff here, who is an expert  
9 in this area who has not been involved, at least I  
10 believe this is the case, has not been involved with this  
11 case as Mr. Howatt has been.

12                   Isn't it possible, perhaps, effective  
13 the 22nd to have that person engaged in the process of  
14 making an independent recommendation to this Commission  
15 on the 27th with respect to whether or not their opinion  
16 is that it is a confidential redaction or not and make  
17 that recommendation to us that we go down the list and  
18 just go yes, no, yes, no and make decisions on the 27th.

19                   Now, admittedly, that may not be  
20 possible because I might be wrong about that person's  
21 availability.

22                   And secondly, there may not be  
23 sufficient time for Staff to do that.

24                   Frankly, I hate the idea, I don't hate

1 the idea, it will slow us down so much to hire some  
2 independent person that does not know anything about this  
3 process, the law, et cetera, to bring this person in here  
4 who does not have things scheduled out for several weeks,  
5 if not several months, who is a consultant.

6 So, I don't know that there's any reason  
7 why we can't use Staff to make recommendations to us, and  
8 we independently need to look at the law and make a  
9 decision.

10 CHAIR McRAE: I want it to be resolved  
11 so that we have a clear path forward. I don't want to  
12 leave here if Staff is not equipped to do it and here we  
13 are again.

14 Mr. Myers.

15 MR. MYERS: I'm not directly involved in  
16 this particular thing. Points to ponder, isn't that on  
17 Saturday Night Live.

18 I just want to point something out maybe  
19 to stick in everybodys crawl until they come back on the  
20 27th.

21 I think the problem you're going to face  
22 on the 27th is that these folks have a different idea of  
23 what competitive harm means, in two ways, and I'm hearing  
24 it from the Commissioners.

1                   Mr. Firestone is talking about  
2 competitive harm in the sense of release of information  
3 that externally will cause harm to the company.

4                   I think the companies and what the  
5 Commission -- there's a second component of competitive  
6 harm here, and that is, if this is, in effect, a  
7 competitive bid process, what that means in the context  
8 of releasing peoples' bottom line during the process and  
9 whether, in effect, that will undermined the integrity of  
10 the process.

11                  If one bidders knows what the other  
12 bidder's bottom line is, and if this process entails  
13 further negotiations, does that give bidders the leg up  
14 on another bidder.

15                  So, you got two kinds of competitive  
16 harm here. One is a process harm to the competitive bid  
17 process if it is going to be a competitive bid process.

18                  And the second is, sort of the external  
19 harm that we don't want to put out people's financing  
20 arrangements and something like that. I think you'll  
21 here on the 27th a disagreement about what is the  
22 competitive harm.

23                  MR. FIRESTONE: And, I think, in that  
24 regard it would be helpful to be clarified as to whether

1 the bids are static, or whether these bids could be  
2 knocked down in price.

3 And I would agree that that changes the  
4 determination, perhaps, as to what is competitive harm  
5 and what's not.

6 CHAIR MCRAE: Well, it sounds very hard  
7 to determine in the abstract, though, you know, what  
8 we're going to get. I understand what your thinking is  
9 on it, but until we have it, we don't know what it is.

10 And what I'm seeking here is some  
11 resolution of the process which Mr. Cherry actually  
12 raised earlier, what happens when we get whatever we get  
13 and how can we quickly resolve what the outcome is.

14 And Commissioner Winslow has suggested  
15 that Staff may serve in that role. And, frankly, I don't  
16 know what the content may be and whether I'm going to  
17 face Staff saying, it's really beyond our call. We need  
18 to have a process that ensures we can get to where we  
19 need to in a very tight time line.

20 MR. GEDDES: Madam Chair, I think you  
21 hit the nail on the head, when you said, We really don't  
22 know until we see it. I think it's hard now to say what  
23 needs to be done on the 22nd when all of the information  
24 is received.

1 I think what the Commission can do today  
2 is ask the parties to go forth on these dates. And then,  
3 ask Staff, as well, to consider whether there is a  
4 possibility to review the material and present it to you  
5 on the 27th.

6 If Staff can't do it, then Staff, will,  
7 at some point, either in the next two days or on the 27th  
8 tell you it can't do it. But until we see the  
9 information, I think it is very hard in a vacuum to say,  
10 this is what's going to happen. If you instruct us to  
11 try to get it done by the 27th, I am sure that whoever  
12 that lucky person is will endeavor to accomplish that.

13 CHAIR McRAE: I'm also looking for the  
14 fail safe, if you will, in the event, that we get this  
15 information and we don't have the expertise to say this  
16 or that, what is going to be the component to that. I  
17 think we should nail all of that down, so that when we do  
18 get here as the Commission again, we have what we need to  
19 act.

20 I guess I'm really going to have to lay  
21 that on Staff's shoulders in the interest of time because  
22 we can go around and round here today. And, frankly,  
23 since I don't know what we'll be looking at, I don't have  
24 all of the answers. So that we can get closure on this

1 point, I will put that responsibility on Staff to either  
2 be equipped to address it or identify and arrange for the  
3 resource that we will need to speak to it as a  
4 Commission.

5 MR. GEDDES: We will either have it  
6 resolved on the 27th or suggest a path forward. But I  
7 would just note, we have at least agreed, all of the  
8 parties and Staff, to these two dates for this type of  
9 information. So, that's a start.

10 CHAIR McRAE: So, that, essentially, is  
11 deferred for the time being the action on your second  
12 motion because there's some further iteration occurring.  
13 And as to the first, I don't know, we can defer that, as  
14 well, to look at the whole thing, or we can act on it  
15 now.

16 MR. HOUGHTON: My question was only to  
17 the date. That was my initial question, too. Just so I  
18 had it correct.

19 Is the date by which the parties are to  
20 submit their position/information on the 15th now,  
21 assuming that an order -- it would be on the 15th with a  
22 reply on the 22nd.

23 MR. GEDDES: Yes.

24 MR. FIRESTONE: If we proceed in this



1 manner, haven't you effectively granted my motion.

2 My motion didn't ask for a ruling. It  
3 asked for us to go forward and have a process on  
4 determining what is confidential and what's not.

5 CHAIR McRAE: Well, actually, it is.  
6 But it might continue depending on what you get. That's  
7 why I did not act on it, whatever date is submitted, you  
8 may well -- you can renew it.

9 COMMISSIONER WINSLOW: Madam Chair. To  
10 response to that, I view this discussion as the  
11 Commission and state agencies discussion not necessarily  
12 as an arms around an agreement with respect to your  
13 motion.

14 In other words, independent of your  
15 motion, we would have to go through this process. I  
16 don't know that we had this on our mind as to what the  
17 end date was going to be. We may incorporate some of  
18 your ideas. But I see it as the Commission's and the  
19 state agencies making a determination as to what is the  
20 best process to proceed into the future.

21 COMMISSIONER CLARK: Madam Chair. I  
22 agree with Commissioner Winslow.

23 And bringing it back to the first issue,  
24 or the first motion.

1                   What I would propose is that we go ahead  
2 and defer that until we get a little more benefit of how  
3 this is going to take shape out in the grander sense.

4                   At least I'm mindful of the E-mail that  
5 Professor Firestone produced where he asked -- you know  
6 -- what should I do to intervene. And I was told, Don't  
7 intervene, because at this stage, under this expedited  
8 process, we'll accept your comments, essentially.

9                   So, I think, unless Professor Firestone  
10 wants us, or request us, as a member of the public for us  
11 to rule on this today, if you have any other information  
12 that would really advocate you becoming a party in a  
13 formal sense and that you want to produce at the next  
14 Commission meeting, I don't think we should begrudge him  
15 doing that.

16                   I guess in the alternative, if you want  
17 a ruling today, we probably certainly can do that, as  
18 well, based on what has been presented. There has been  
19 pretty good case law and pretty good authority cited with  
20 regard to standing. I feel like I understand that issue  
21 fairly well. But there may be some more information that  
22 the Professor would want to offer in that regard.

23                   CHAIR McRAE: Well, I would note that  
24 Professor Firestone also shared with us his background,

1 his legal background, and his knowledge of the rules,  
2 which I am assuming was available to also earlier when  
3 the intervention discussion was in play.

4 I just note that you made considerable  
5 references to the rules, and they do actually speak to  
6 some of the processes that exist before the Commission.  
7 And so, I certainly am sympathetic to some extent to the  
8 surprise, but at the same time, I think, you made a very  
9 good case of your tools and resources of finding out what  
10 the procedures are for various things. So, that is just  
11 an observation on my part. I am perfectly willing to  
12 defer on the suggestion of waiting.

13 Also, I think it is pretty clear, at  
14 least historically it has been known that the Commission  
15 speaks by the Commission's voice versus the Commission  
16 Staff. I had not seen the memo, of course, and I  
17 understand that, perhaps, in some circumstances that  
18 could be confusing.

19 And, I think, also, the Commission's  
20 action in opening the process to the public so  
21 extensively may well -- I mean, we may have certainly  
22 deviated from some of our normal practices in making sure  
23 that more participation was afforded. But I don't  
24 necessarily conclude that that means the process now is

1 open to the public at large.

2 So, I do want us to be careful and  
3 thoughtful about how we do address this question of  
4 access, if you will.

5 And if it's the pleasure of the group  
6 that we defer both parts of the matter, one, we've talked  
7 about and we worked out our process as to how we plan to  
8 proceed, if we want to not act on the motion, the first  
9 motion at this time, I'm prepared to do whatever is the  
10 pleasure of the body.

11 MR. HOUGHTON: Madam Chair, as a point  
12 of clarification.

13 If there is a deferral on the motion, is  
14 there an invitation for either Professor Firestone or the  
15 parties to submit additional material?

16 As Commissioner Clark has noted, I think  
17 we, at least, speaking for NRG, we said based on the  
18 record just about all we could say in terms of the law  
19 and the process. Again, obviously, it is the  
20 Commission's conclusions as to how to proceed here. But  
21 I just have a little concern, and Commissioner Winslow  
22 has addressed this to some extent, in the treatment of  
23 the second motion, I would not want any inference to be  
24 drawn that there has been a determination on this, or

1 that Mr. Firestone does, in fact, have -- the issue of  
2 his status has been concluded. We can find a path  
3 forward, I guess.

4 CHAIR McRAE: Yes.

5 MR. HOUGHTON: But we, frankly, do have  
6 a lot of tough issues that we have to sort out in the  
7 next several weeks.

8 I have a serious concern about the  
9 overall, chilling effect both now and prospectively on  
10 bidding. And while I think we will all work in good  
11 faith to resolve issues in the next several weeks, I am  
12 highly confident that we will not resolve all issues in  
13 the next several weeks.

14 And I think it is very prudent for the  
15 Chair and the Members of the Commission to ask Staff to  
16 have Plan B, so to speak in place, because I think we  
17 will get there pretty quickly.

18 So, I don't mean to be unrealistic about  
19 it. But I'm trying to understand, I guess, precisely  
20 what the status of the motions might be.

21 CHAIR McRAE: Well, let's be clear on  
22 which one is the first and which one is the second.

23 One is the standing motion. Mr.  
24 Firestone is a party for purposes of sharing information

1 and the like.

2 And the second one has to do with what  
3 kind of confidential information is submitted and  
4 whether, in fact, the scope of confidentiality is  
5 appropriate.

6 I think what I understood Commissioner  
7 Winslow to say, our process, I mean, the Commission would  
8 have had an obligation no matter what to make sure that  
9 there was not abuse of the confidentiality provisions.  
10 That is irrespective of any motion on the part of  
11 Professor Firestone.

12 So, that was where we left that piece of  
13 it. And Professor Firestone took that as addressing his  
14 motion, if you will. But it was a process that would  
15 have been called for.

16 So, I mean, if it requires further  
17 action, since we approved the motion, it's not really,  
18 we're just going with the Commission ordinarily would  
19 have done.

20 So, those two motions are still on the  
21 side, if you will. That is what I was trying to get  
22 clear on when we got on this discussion.

23 So, we still have to decide about one  
24 and two.

1                   Professor Firestone seemed to think that  
2   two was addressed by virtue of whatever is going to  
3   happen with the review of your confidentiality  
4   restrictions.

5                   MR. HOUGHTON: Madam Chair, I don't want  
6   to belabor it. We have been here for quite some time.  
7   The rubber, so to speak, will meet the road when there  
8   are issues with respect to confidentiality and the  
9   question is, Does Mr. Firestone have access to  
10   information by virtue of being a party, which is an issue  
11   we have not yet determined?

12                  CHAIR McRAE: Exactly. That is why I  
13   said, We still have to go back to one. And I said to the  
14   Commission, is this something you are asking to defer  
15   based on the conversation, or are you prepared to act on  
16   it now? Those were my words before we got here. And it  
17   was actually to the Commission, as well as other parties  
18   here.

19                  COMMISSIONER WINSLOW: Madam Chair. I  
20   concur. I'm ready to vote, Dr. Firestone. If you want  
21   us to vote on motion one, tell us. Tell us you want us  
22   to vote, and we will be very happy to accommodate you.

23                         If you don't want us to, I think we will  
24   give you the courtesy, as we have all along, in terms of

1 listening to your further comments with respect to that  
2 issue.

3 With respect to your second motion,  
4 perhaps, you want to withdraw that, if you are satisfied  
5 with the path forward that the Commission has decided to  
6 take. I'm ready to vote on that, as well.

7 I agree with what Mr. Cherry says. And,  
8 I think, if you'll recall, Mr. Firestone, this big  
9 theory, the big funnel issue was brought up by  
10 Mr. Geddes, I stopped and said, That's not a bad idea.  
11 But we have really used a big funnel approach with  
12 respect to the people and the input here. We really  
13 have. We've listened to everybody. You are one of the  
14 ones, and, frankly, we have been very impressed with your  
15 input. You have done a wonderful job, as well as some of  
16 the other people that have given us public input.

17 With respect to the bidding and what we  
18 need for Delaware, at some point in time, this Commission  
19 has to step up to the plate and vote on the issues and  
20 make decisions. And we will start doing that. If you  
21 want us to do it right now, we will do that for you.

22 CHAIR McRAE: Let me be clear.

23 COMMISSIONER WINSLOW: Motion one and  
24 Motion two. Whatever his preference is, I'm ready, and



1 Commissioner Clark has expressed it, too, if he thinks it  
2 is in his best interest to delay it, I would go along  
3 with that. If he wants a decision, I would be happy -- I  
4 think I have a duty to vote on it.

5 CHAIR McRAE: He mentioned earlier that  
6 he had just received information. So, I would be  
7 certainly willing to entertain the deferral. Fine. It's  
8 your call. What would you like?

9 MR. FIRESTONE: I would say that due  
10 process would require that I be allowed to submit written  
11 averments substantiating the basis for my standing in  
12 this matter because I have not had the opportunity. And  
13 as I said, the first challenge to the standing, explicit  
14 challenge was raised just this morning in written  
15 argument.

16 So, I certainly would request that the  
17 motion regarding one be deferred.

18 COMMISSIONER WINSLOW: Madam Chair, I  
19 move that motion number one be deferred to the next  
20 hearing.

21 COMMISSIONER LESTER: I'll second that.

22 CHAIR McRAE: All in favor.

23 Yea.

24 COMMISSIONER LESTER: Yea.

1 COMMISSIONER WINSLOW: Yea.

2 COMMISSIONER CONAWAY: Yea.

3 COMMISSIONER CLARK: Yea.

4 MR. CHERRY: Yea.

5 MS. COHEN: Yea.

6 CHAIR McRAE: Opposed?

7 So, that's deferred.

8 The second motion is, I really, at this  
9 juncture, we changed the process so extensively that I am  
10 not sure that is something that is still on the table.  
11 Well, at least by your words.

12 MR. FIRESTONE: I guess I'm confused.  
13 Because the second motion asked for a process to  
14 determine whether things were appropriately redacted or  
15 not. And that is what I understand you are now  
16 proceeding on.

17 So, I am puzzled as to the distinction  
18 being what I requested which was not let everything out.  
19 It was, Have the parties go back through, explain why  
20 they are redacting material, give us some information on  
21 what they redacted, and ultimately, this body, whether it  
22 is on the 27th or later make a determination as to  
23 whether these things are public information or whether  
24 they should be treated as confidential.

1 CHAIR McRAE: I think the point that  
2 Commissioner Winslow is making, and he can clarify for  
3 himself, but my summation of that was, we, as we sat  
4 here, we were working through a process for the four  
5 agencies to have to make the decision.

6 To the extent that that also served your  
7 interest that was fine, but the process was an iterative  
8 one among the ultimate decision makers.

9 And to the extent that meant there would  
10 be more discussion of the confidentiality and the scope  
11 of that, then, it may well have been responsive to your  
12 motion. But the distinction was, the process was being  
13 actually worked among these parties.

14 MR. GEDDES: Madam Chair. Point of  
15 clarification.

16 Professor Firestone's motion and the  
17 request for early relief goes way beyond what the  
18 Commission has decided to do.

19 And like any public comment, the  
20 Commission can consider it and act accordingly. You come  
21 up with a process. All of the parties have agreed to it.  
22 The motion, in essence, has been muted by the  
23 Commission's action because 90 percent of it has been  
24 addressed.

1 But you have not specifically granted  
2 this motion and all of the relief that he asked for. And  
3 so, I would suggest that this motion can be placed aside.  
4 The information received, in accordance with the schedule  
5 that we proposed here, and if Professor Firestone wants  
6 to renew his motion on the 27th, he can.

7 CHAIR MCRAE: Fine. That's fine. I  
8 left it to him. He said he was satisfied. It is fine  
9 with me.

10 Any Commissioners have any problems, and  
11 the other parties, as well, other agencies?

12 COMMISSIONER WINSLOW: I don't mean to  
13 beat a dead horse.

14 But the law clearly makes this  
15 Commission responsible for making decisions with respect  
16 to confidentiality issues. In this particular case, the  
17 state agencies, as well, as the Commission.

18 Way before your motion was filed, this  
19 Commission contemplated that decision and was discussing  
20 the end game of how this was all going to work.

21 There was a Staff meeting today, and I  
22 am willing to bet you, independent of your motion, that  
23 was also on their agenda.

24 And so, I think the thing to do, because

1 I think I will move to defer consideration of your motion  
2 until you get the chance to see the results of the  
3 process and what occurs, and then you may not have an  
4 objection to what we have done, and if you do, then you  
5 can state that and we'll rule on it. So, that is my  
6 intent, unless some other Commissioner feels that they  
7 want to do something otherwise.

8 CHAIR McRAE: Well, actually, I actually  
9 prefer the muted for the time being renewed. Because I  
10 don't have all of the details here, but, essentially, it  
11 called for a process. And, I think, we've have agreed  
12 that there won't be a process. But I don't know why we  
13 would defer it to act on it again when we can determine  
14 it now.

15 COMMISSIONER CLARK: Are you saying deny  
16 without prejudice?

17 CHAIR McRAE: Yes. That's exactly what  
18 I would prefer. Can I have a motion to that effect?

19 COMMISSIONER WINSLOW: So moved.

20 COMMISSIONER CLARK: Second.

21 CHAIR McRAE: All in favor.

22 Yea.

23 COMMISSIONER LESTER: Yea.

24 COMMISSIONER WINSLOW: Yea.

1 COMMISSIONER CONAWAY: Yea.

2 COMMISSIONER CLARK: Yea.

3 MR. CHERRY: Yea.

4 MS. COHEN: Yea.

5 CHAIR McRAE: Opposed? Very fine.

6 MR. CHERRY: I'm still struggling with  
7 process here, as I learn. So, please forgive me.

8 CHAIR McRAE: By all means.

9 MR. CHERRY: You made me lose my train  
10 of thought.

11 Mr. Geddes had suggested that we had, by  
12 developing the process, essentially, given Professor  
13 Firestone 90 percent of what he wanted.

14 Could you tell me what 10 percent he  
15 didn't get?

16 MR. GEDDES: He didn't get a specific  
17 evaluation of each and every confidential redaction.

18 MR. CHERRY: But he may, depending upon  
19 where this tennis match ends up.

20 MR. GEDDES: Possible.

21 CHAIR McRAE: But in all events, I think  
22 it's clear that deny without prejudice means that he is  
23 in a position that if he didn't get what he wanted, he  
24 can certainly raise it.

1 MR. CHERRY: I will be voting for that  
2 motion. Thank you.

3 CHAIR McRAE: Okay. Have we covered all  
4 of the matters? It seems every time Mr. Houghton is  
5 here, we stay longer.

6 MR. HOUGHTON: I apologize.

7 CHAIR McRAE: There's a memo, too,  
8 though, a Staff memo that addresses the other matters,  
9 but there's one more item of business associated with  
10 this docket before we close.

11 MR. HOWATT: Madam Chair, Members of the  
12 Commission and other state agencies.

13 As the RFP decision begins to come  
14 closer and closer, we became concerned at the Staff level  
15 that it was important that you have adequate information  
16 to be able to make the decision that's going to be  
17 forth-coming. And we thought that one of the questions  
18 that would always, probably, crop up in that evaluation  
19 would be, What are the alternatives to the wonderful  
20 generation proposals that we have received, and how,  
21 perhaps, do they compare to those generation proposals.

22 Delmarva has filed an IRP. And it list  
23 in its IRP many different potential possibilities for  
24 supply. And so, we thought that there might be a quick

1 way to, perhaps, help you in your decision process with  
2 the RFP.

3 So, toward that end, we asked New Energy  
4 Opportunities, which has been the consultant that we have  
5 been using on the RFP process, and we've asked them to  
6 give us an estimated cost of how much it would, or they  
7 would charge us to go through and examine the other  
8 supply options that may or may not be out there with  
9 respect to the IRP and how those might compare to the  
10 generation proposals that you will ultimately be deciding  
11 on.

12 They came back to us with a price of  
13 \$49,230 and a time frame during which they would provide  
14 us an interim report on Delmarva's IRP by April 4th.  
15 That's what we have attempted to fit into the schedule  
16 that you have already approved in a previous order.

17 So, we have put in an interim report in  
18 there, and we are proposing that that interim report  
19 would be available from New Energy Opportunities for an  
20 increase in their existing contract price of \$49,320.

21 In addition, New Energy Opportunities  
22 has also taken time to come down here, over and above  
23 what they originally contracted for, they have spent time  
24 on the Bluewater Energy motion that we had earlier before



1 the Commission. They have also come down here, and they  
2 have spent time with presentations to the state agencies  
3 and all of the parties that have been working with this.

4 So, they've done more than they have  
5 originally contracted for in the contract. And in  
6 keeping tabs on that, that comes out to about -- I  
7 estimated in your memo \$10,500 because it was an estimate  
8 I had -- but I now have actual information that that cost  
9 over and above the normal contract was \$9,391.70.

10 In my memo to you, I was asking the  
11 Commission and state agencies to approve an increase of  
12 the contract with New Energy Opportunities to  
13 \$338,813.97. But with the revisions in place, that  
14 number is \$337,705.67.

15 So, my memo is asking the Commission to  
16 approve those increases to the contract. And, I guess,  
17 asking the Commission to authorize the New Energy  
18 Opportunities team to undertake this interim review of  
19 the IRP such that they will have additional information  
20 when making decisions with respect to the RFP.

21 CHAIR McRAE: Commissioner Winslow.

22 COMMISSIONER WINSLOW: Madam Chair, from  
23 the beginning, this entire process has been maybe more  
24 troubling to me than it was to Dr. Firestone. And one of

1 the issues is the disconnect between IRP and RFP, in my  
2 mind.

3 And I am very, very supportive of  
4 getting as much information as possible from the experts  
5 who, in my opinion, have done a very fine job in  
6 supporting this whole process. I think there are  
7 alternatives, as Mr. Howatt has stated. And although  
8 these bidders have done enormous work to get their bids  
9 on the table on a very crushing time frame, a lack of a  
10 complete IRP is a very problematic thing. And the more  
11 information we get to assist in our decision making, the  
12 better off we're going to be, for example, the viability  
13 of some of the things that were in the prospective IRP  
14 that was presented by Delmarva, I don't know how viable  
15 some of those are. If we can get more flush around  
16 those, we know what those alternatives are, it would be  
17 very helpful.

18 So, I am highly supportive of additional  
19 money for additional input with respect to this whole  
20 decision we're going to make.

21 CHAIR McRAE: Any other Commission  
22 members have any comments?

23 MR. MYERS: Just a point of detail. The  
24 IC is not only yours, but the other three state agencies,

1 too, by statute. But it is not going to be only your  
2 agreement that is going to require the sign off. It is  
3 from the other three agencies.

4 CHAIR McRAE: You mean, as far as  
5 additional funds?

6 MR. MYERS: That would be my position.  
7 Hired by all of them. It will require they sign off from  
8 the other three, also. It's Delmarva's dime, but it  
9 requires all four state agencies.

10 CHAIR McRAE: Well, it does not have a  
11 signing sheet here. So, I am assuming we are only  
12 speaking this go around for ourselves.

13 And I would take Commissioner Winslow's  
14 comments in the form of a motion to approve the request  
15 of Staff.

16 Is there a second?

17 MR. CHERRY: Second.

18 MR. MYERS: You can sign off separately.

19 CHAIR McRAE: I was about to asked Mr.  
20 Myers. I think each agency probably has his own approval  
21 process for spending money.

22 MR. CHERRY: Let me just say I think the  
23 proposal is a good one, and we ought to go with it.

24 COMMISSIONER CONAWAY: I will second it.

1 CHAIR McRAE: All in favor.

2 Yea.

3 COMMISSIONER LESTER: Yea.

4 COMMISSIONER WINSLOW: Yea.

5 COMMISSIONER CONAWAY: Yea.

6 COMMISSIONER CLARK: Yea.

7 MR. CHERRY: Yea.

8 MS. COHEN: Yea.

9 CHAIR McRAE: Opposed? Very fine.

10 I must say this. I do appreciate the

11 patience of all of the participants in this process.

12 Because as you know, it is very unique to our experience

13 and yours, as well. I don't want to say it is learn as

14 you go, but to some extent it is, because we discover new

15 issues with every step we take. So, I would hope that I

16 would see that continuing patience because I'm sure as we

17 continue to move through this process, there will be new

18 challenges at every turn.

19 So, let me just recognize your

20 cooperation and hope very much that we continue in that

21 vein. Thank you very much.

22 (The Public Service Commission Hearing

23 was concluded at, approximately, 3:45 p.m.)

24

## C E R T I F I C A T E

STATE OF DELAWARE:

NEW CASTLE COUNTY:

I, Gloria M. D'Amore, a Registered Professional Reporter, within and for the County and State aforesaid, do hereby certify that the foregoing Public Service Commission Hearing, was taken before me, pursuant to notice, at the time and place indicated; that the statements of said parties was correctly recorded in machine shorthand by me and thereafter transcribed under my supervision with computer-aided transcription; that the Public Service Commission Hearing is a true record of the statements given by the parties; and that I am neither of counsel nor kin to any party in said action, nor interested in the outcome thereof.

WITNESS my hand and official seal this  
14th day of February A.D. 2007.

GLORIA M. D'AMORE  
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